(14) (13) (14)

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, Comptroller General of the United States,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, *et al.*,
Appellants,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

BRIEF OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET AL.*

Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees

QUESTIONS PRESENTED

1. Did the district court correctly conclude that Congress constitutionally delegated the deficit reduction powers in the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Act"), where (a) the sole justification for the Act was Congress' unwillingness to vote for spending reductions and/or tax increases, (b) the Act provides virtually no guidance to those who must make the budget predictions required by it, and (c) the Act specifically exempts those predictions from all judicial review?

2. Did the district court correctly conclude that the role of the Congressional Budget Office under the Act did not involve a shared administration of the Act, in violation of the doctrine of separation of powers, because it was purely advisory, despite the extensive duties assigned to the Office, the admission of the Comptroller General that he has worked closely with the Office in making his determinations, and the considerable deference which the Act requires the Comptroller General to give to the report prepared jointly by the Office and the Office of Management and Budget?

3. Did the district court correctly conclude that the Comptroller General, who is appointed by the President from among three candidates suggested by Congress, who may be removed only by Congress through a joint resolution, and whose budget is determined entirely by Congress without Presidential interference, is subject to potential influence by Congress, and is therefore barred by the doctrine of separation of powers from making the determinations assigned to him under the Act?

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BRIEF OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET AL.*

This brief is submitted on behalf of appellee Mike Synar and the eleven other members of the United States House of Representatives (the "congressional appellees") who were plaintiffs in one of the two actions which are before the Court on this consolidated appeal. The United States, which is also an appellee, fully supports the judgment below, including the conclusion of the district court that the delegation of power in-

Moreover, while the fall-back mechanism lacks the automatic features of the primary provisions, it is far from a wholly cosmetic exercise. The reason is a practical one: the attention of the entire nation will be focussed on the debate and vote over the specific budget reductions outlined in the report of the Directors in a way which is very different from that of the ordinary appropriations bill in which only one part of the problem is on center stage. Under the fall-back, there is no place to hide, so that if Members do not vote to reduce the deficit, or do so in a politically unacceptable way, that will create an issue for their opponents, especially in election years such as 1986.

3. **PROCEEDINGS BELOW**

This action was filed on December 12, 1985, by Representative Mike Synar under the special review provision contained in section 274(a)(1) of the Act. Pursuant to paragraph 5 of that provision, a three-judge court was convened. On December 19, an amended complaint was filed, which added eleven additional plaintiffs who are also members of the House of Representatives. On December 30, the Senate and the Comptroller General moved to intervene, with the consent of the parties, and filed briefs on the merits. That same day, the Department of Justice, on behalf of the United States, filed a motion to dismiss for lack of standing, arguing that the jurisdictional provision in section 274(a)(1), which specifically grants standing to members of Congress, is unconstitutional. The following day appellee NTEU filed its complaint challenging the constitutionality of the trigger mechanism, and on January 2, 1986, the two cases were consolidated.

On January 6, 1986, the congressional appellees moved for summary judgment and responded to the motion to dismiss for lack of standing. With their memorandum of law on standing, they submitted the affidavit of Representative Synar (J.A. 17-19), which supported each of the claims of injury relied on in the complaint to support standing: (a) the unconstitutional

provisions interfere with the constitutional duty of members to enact laws regarding federal spending; (b) the salaries of the members and their staffs, as well as their office expenses, will be automatically reduced if the trigger is activated; and (c) thousands of their constitutents will be injured through automatic reductions in a variety of programs once the trigger is activated. Their memorandum also explained precisely why, contrary to Justice's memorandum, the across-the-board cuts would inevitably reduce the salaries of their staffs and their office expenses, a point which Justice eventually conceded in its reply. Justice still maintained that the standing provision in the Act could not constitutionally apply unless the salaries of the members themselves were cut, but the parties did not reach agreement on whether those reductions would occur. Justice did not, however, challenge the standing of NTEU. The parties subsequently consented to the intervention of the Speaker and Bipartisan Leadership Group of the House of Representatives, and oral argument on all issues in both cases was held on January 10, 1986.

On February 7, 1986, the district court issued its unanimous opinion and order, holding that the trigger mechanism in sections 251 and 252 of the Act is unconstitutional. Initially, the court addressed the issue of standing, finding it necessary to rule on the standing of both sets of plaintiffs because there were separate cases which had merely been consolidated. J.A. 32. After finding that NTEU had standing (J.A. 34-36), it addressed the standing of the congressional plaintiffs and held that, under the law in the District of Columbia Circuit, they were entitled to maintain their action. The court based its decision on a finding that the congressional plaintiffs were injured in fact in their capacities as legislators because the Act interferes with their lawmaking duties. J.A. 37. It further found that the statutory grant of standing to them removed any possible "equitable discretion" to deny them access to the courts. J.A. 38. Accord-

ingly, it did not pass on the other standing grounds relied on by the congressional plaintiffs.[7]

On the merits, the district court rejected the argument that the delegation of the power to decide the amount of the budget deficit, and hence the amount by which the statutorily-mandated spending levels in most government programs would be reduced, was excessive. J.A. 38-55. The court analyzed the various factors cited by plaintiffs, but found that none of them was sufficient to strike down the delegation. In addition, in the court's view, this delegation was no different than those made to a ratemaking or price control agency. J.A. 45. As a result, the court did not address the distinction raised by plaintiffs that the reason that Congress passed Gramm-Rudman was not to assign fact-finding duties to an agency, but to reduce budget deficits without forcing Congress to vote for spending cuts or tax increases.

However, the court concluded that the Act violated principles of separation of powers because it assigned administrative responsibilities to the Comptroller General, an official who could be removed by a joint resolution of Congress, and never by the President acting alone, even for cause. In concluding that the removal power rendered the Act unconstitutional, the court made it plain that the continued potential for congressional influence over the actions of the GAO, not the inability of the President to fire the Comptroller General, created the constitutional flaw, because it was this possibility of congressional influence in the administration of the laws that breached the doctrine of separation of powers. J.A. 74. The court then concluded that, given Congress' explicit inclusion of the fall-back mechanism, the trigger mechanism could not be saved by striking down the removal provision. J.A. 78. These expedited appeals followed.

[7] It is our understanding that the Solicitor General will not press his objections to the standing of either NTEU or the congressional appellees in light of the addition of Van Riddell, an individual member of NTEU who is concededly affected by the sequestration order. We agree that the Court need not decide those questions, although we contend that the standing of all the plaintiffs was properly decided below.

SUMMARY OF ARGUMENT

1. The trigger mechanism in the Act is unconstitutional as an undue delegation of legislative authority both because its sole purpose is to create an administrative device to reduce spending without concomitant congressional responsibility for the decision to do so, and because all of the factors utilized by this Court to determine whether a particular delegation is excessive demonstrate its unconstitutionality.

The Act is different from all other statutes previously challenged on delegation grounds in one important respect: the Act was not motivated by the practical need to carry out legislative choices, but was passed in order to foster legislative avoidance. The history of the Act is clear that the sole reason for Gramm-Rudman was that the sponsors believed that deficit reductions were desirable, but they were unable to muster the legislative support to bring about particular spending cuts or tax increases. While Congress may have thought that this statute was "necessary" in order to achieve a balanced budget, the Act must also be "proper" if it is to survive a constitutional challenge.

In almost every delegation upheld by this Court, the pragmatic necessities of implementing the law have been a major factor. The Court has recognized the impossibility of Congress legislating on matters such as individual tariffs, the minimum wage for different industries, and the maximum prices for goods and services in a regime of price control. For this reason it has upheld delegations to administrative officials as the only means of carrying out Congress's will. By contrast here, Gramm-Rudman relieves Congress of no burdens since it will continue to have to pass appropriations legislation every year during the life of the Act. The only difference is that future Congresses will be able to deny responsibility for spending reductions by blaming them on Gramm-Rudman. Since the only justification for the delegation is the desire to avoid political accountability, the delegation is necessarily improper.

Even under the traditional tests, the delegation must fail based on an analysis of all the relevant factors, taken as a whole. Of particular importance here are that (a) the law deals with a

primary legislative function—the power of the purse; (b) the extent of the delegation is virtually unlimited and the standards for its exercise almost non-existent; and (c) there is not even the minimal check of judicial review available to guard against arbitrary action.

2. The Act is also unconstitutional as a violation of principles of separation of powers, because it requires the participation in the administration of the Act by the Director of CBO, who is an official of the legislative branch. All parties agree that if the CBO had a formal decisional role in the process, the Act would be unconstitutional. Its supporters defend the Act by claiming that the role of CBO is purely advisory and hence not improper.

Under the original version of the Act, CBO and OMB had the joint responsibility for making the operative determinations. In order to avoid the constitutional questions raised by that plan, Congress gave to the Comptroller General the duty to review the joint OMB-CBO report and issue his own report based on theirs. That change did not, however, transform the role of CBO into a purely advisory one, since the Act requires GAO to consider the CBO-OMB report fully and to explain any differences between that report and GAO's. Furthermore, the Comptroller General has acknowledged that, in order to make the Act work under the extremely short timetable available for his review, he has established a close working relationship with OMB and CBO—precisely the kind of sharing in the administration of the law between executive and legislative officials that separation of powers forbids. Moreover, this problem of a congressional role in the administration of the Act is exacerbated because the Comptroller General is also subject to other congressional influences, principally because he may be removed by a joint resolution of Congress, and is immune from discharge by the President, even for cause.

ARGUMENT

THE PROCEDURES BY WHICH THE SPENDING REDUCTIONS ARE MADE ARE UNCONSTITUTIONAL.

I. THE ACT IMPROPERLY DELEGATES LEGISLATIVE AUTHORITY TO REDUCE SPENDING LEVELS.

Article I, Section 1 of the Constitution provides that all lawmaking powers shall be vested in the Congress, and Article I, Section 7 requires that both Houses of Congress and the President be involved in any lawmaking decision. Moreover, as made clear by this Court in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the lawmaking provisions of Section 7 are the exclusive means by which laws may be made. It is also clear, however, that not all rules which have the force and effect of law must be made by Congress. For many years it has been recognized that the authority to issue binding rules can be delegated to administrative agencies, provided that the delegation is not "excessive." The question in each case becomes whether Congress has crossed the boundary between lawful delegation and invalid lawmaking.

This Court explicitly recognized nearly 75 years ago that "it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations." *United States v. Grimaud*, 220 U.S. 506, 516-17 (1911). Or, as Justice Burton explained in *Lichter v. United States*, 334 U.S. 742, 779 (1948), the "degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative powers is not capable of precise definition." However, in drawing that line, we believe that the views of Justice Harlan, joined by Justices Stewart and Douglas in their dissenting opinion in *Arizona v. California*, 373 U.S. 546, 626 (1963), are a helpful statement of the purpose of the doctrine and lead to the conclusion that the delegation here is excessive:

> The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. *First*, it ensures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged. (Emphasis in original, footnote omitted).

Our argument on the delegation issue is divided into two parts. First, we argue that the unique history of this delegation, in particular its admitted goal of enabling Congress to reduce the deficit yet avoid the responsibility for voting for reductions in specific programs, dictates that this Court should refuse to uphold it. For this reason alone, this Court should set it aside rather than review it as if Congress had passed the Act because the practical realities of governing left it no choice but to assign to an administrative agency the job of making the thousands of decisions needed to carry out its will. Second, even if the traditional tests for undue delegation apply, the totality of the factors here establish that the trigger mechanism constitutes an undue delegation of legislative authority.

A. Because The Purpose Of The Act Is To Circumvent A Failure Of Legislative Will, The Delegation Cannot Be Upheld As An Accommodation To The Practical Necessities Of Governing.

The fundamental flaw in the briefs of the appellants is their failure to discuss, let alone appreciate the significance of, the reason for the enactment of Gramm-Rudman. But, as this Court observed in *United States v. Lovett*, 328 U.S. 303, 307 (1946), a ruling on the constitutionality of a statute requires "an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to

its passage." The district court's opinion is also void of any recognition of the significance of those circumstances, and as a result the court drew upon false analogies with other laws passed for very different reasons. Those differences are not simply matters of degree, nor do they relate only to different subject matters; rather they go to the heart of the rationale for Congress's decision to delegate in those cases as contrasted with the reasons for doing so here, and therefore those differences vitally affect the outcome of the delegation at issue here.

One sentence found in the brief of the Comptroller General in this Court illustrates how appellants have slid by this problem: "Despite a widespread consensus that the deficits must be reduced, both Houses of Congress and the President have been unable to enact a formula of budget cuts and/or revenue increases that would achieve the needed reduction." (Br. 2). A quick reading of that sentence would lead one to assume either that Congress had uncertain knowledge about the problem, that the issues were too complex for its resolution, that it needed further information or expert opinion, that the decisions should be made in an adjudicatory setting, that the process needed flexibility to turn on or off the specific remedies in response to changing conditions in the economy, or that the decisional process cannot operate in public, as Congress does, and still be effective.[8] Of course, none of those assumptions accurately depicts why Gramm-Rudman was passed. Indeed, as we demonstrated above (pp. 2-7), Congress and the President have been "unable" to enact such laws only in the sense that they have been unable to reach agreement, *i.e.,* they do not have the votes required by the Constitution to enact specific solutions that lower the deficit.

This is not a case in which Congress had multiple motives, some of which may arguably have been improper. *See United States v. O'Brien*, 391 U.S. 367, 382-86 (1968). There is only one purpose for creating the Gramm-Rudman automatic trigger mechanism: to lower the budget deficits without requiring

[8] This last reason plainly distinguishes the delegation here from the broad powers delegated to the Federal Reserve Board and the Federal Open Market Committee. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979).

members to vote for specific spending cuts or tax increases. Nor is this a case, like *O'Brien*, where the claim of an improper purpose is based on a few statements in the legislative history, some of them by opponents. As described above at 5-7 and in the Addendum, the purpose behing the trigger is undisputed by anyone in Congress or elsewhere. Therefore, the traditional unwillingness of the Court to seek to ferret out a possibly illegitimate congressional motive cannot be the basis for declining to rely on one when, as here, there is no dispute about what Congress had in mind in passing this law. And given the absence of any other purpose for Gramm-Rudman, the Court need not be concerned with trying to decide whether Congress would have passed it for only proper reasons, or with balancing proper against improper motives in deciding the fate of the Act.

The district court suggested that no case had ever turned on the difference between political necessity and pragmatic necessity. J.A. 46. Although we agree that no case has specifically drawn that distinction, countless decisions have relied upon pragmatic necessity to support delegations which might otherwise have been viewed as excessive. Thus, in *Bowles v. Willingham*, 321 U.S. 503, 515 (1944), the Court observed:

> In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy, that indeed is frequently the only way in which the legislative process can go forward.

Similar sentiments were echoed in *American Power & Light Co. v. Securities & Exchange Comm'n,* 329 U.S. 90, 105 (1946):

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand

> myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impractical to compel Congress to prescribe detailed rules. . . .

Or, as Chief Justice Stone observed, speaking for the Court in *Opp Cotton Mills, Inc. v. Administrator,* 312 U.S. 126, 145 (1941), "[i]n an increasingly complex society Congress could obviously not perform its functions if it were obliged to find all the facts subsidiary to the basic conditions which support the definite legislative policy in fixing, for example, a tariff rate, a rail rate, or the rate of wages to be applied in particular industries by a minimum wage law." *See also* the concurring opinion of Justice Rehnquist in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 675 (1980)("*IUD v. API*"), where he observed that practical considerations are relevant where "the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the field. . . ." Even when this Court set aside the delegation in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 427 (1935), it noted that delegations could be upheld where "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute," *quoting Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). As Chief Justice Stone summarized the law in *Yakus v. United States*, 321 U.S. 414, 424 (1944), the Constitution "does not demand the impossible or the impracticable." Indeed, there is hardly a case in this Court dealing with a delegation issue in which the pragmatic realities of the situation were not clearly in the Court's mind in determining whether the delegation was proper.

One reason that no decision of this Court since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), has overturned a delegation is that in no case since then can it fairly be said that the purpose of the delegation was to enable Congress to evade its lawmaking responsibilities. While the

statute in *Schechter* had many faults, one of them clearly was an attempt by Congress to hand off to private parties the difficult decisions of how to bring about industrial recovery in the midst of the Depression. Thus, while no case has ever held that necessity is the mother of delegation, Justice Cardozo observed in his concurring opinion in *Schechter* that proper delegation "is born of the necessities of the occasion." 295 U.S. at 552. All of those decisions clearly imply that their outcome is a product of the realities of our modern society, and we now ask the Court to recognize explicitly that fact as a prerequisite for upholding broad delegations and to deny Congress the right to delegate, where, as here, its sole purpose is to "abdicate its functions." *Bowles v. Willingham, supra*, 321 U.S. at 515. At the very least, we urge the Court to insist upon far more rigid standards in cases such as this in determining whether Congress has unduly transferred its lawmaking powers to administrative officials.

Two other aspects of the doctrine of necessity bear on the constitutionality of this Act. Insofar as Congress may seek to defend this law on the ground that the expert judgments of administrative officials are needed, that cannot suffice since those judgments have been available in the past and can readily be obtained in the future without delegating the decision-making authority as the Act does. Thus, OMB and CBO are already deeply involved in the budget process, and nothing prevents GAO from participating also if Congress should so choose. Congress can request as much help as it needs from whomever it chooses, whenever it needs it, and in whatever format is most useful. All of the data supplied to it can be made public, and Congress can write procedures requiring that the advice provided by experts be given careful consideration without Congress abdicating its lawmaking responsibilities. Indeed, that is basically what will be done if the fall-back mechanism should go into effect, and the report of the Directors, predicting the deficit for the next fiscal year based on the current status of the appropriations legislation, is submitted to the joint budget committee of Congress. But, like other reports, it would be purely advisory, and it would be up to Congress and the President to

vote on the report, rather than having reductions automatically made based on the findings of three administrative officials.[9]

Second, the Gramm-Rudman mechanism will not relieve Congress of a single burden which it now has. It will have to vote on the concurrent budget resolution every April, it will have to approve all appropriations bills for all agencies, just as it has done for nearly 200 years, just as it did for fiscal 1986 before Gramm-Rudman became law, and just as it did a week later on the continuing resolution for fiscal 1986, which is the minimum that will be needed every year to keep the government running. But there will be one difference: the votes taken will not really count but will simply produce a budget ceiling.

Assume, for example, that appropriations bills for the Defense and Transportation Departments are enacted into law this July. If GAO's report in August predicts that the target deficit will not be met, the amounts contained in those appropriations statutes will be reduced by the required percentage unless the Congress enacts other legislation to achieve the required deficit levels. Thus, the real change made by Gramm-Rudman is that, as Senator Gorton said, "the consequences of inaction or a deadlock will be that we will nonetheless proceed in the direction of a balanced budget and of a stronger economy." 131 Cong. Rec. S 12574 (Oct. 3, 1985). But the workload on Congress will not be reduced, and in fact it might actually be increased if Congress has to take a second look at already-passed appropriations legislation in order to find alternative means for achieving the Gramm-Rudman cuts. The district court referred to the Gramm-Rudman process as

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[9] Interestingly, even the current balanced budget constitutional amendment, S.J. Res. 225, recently rejected in the Senate, *see* 132 Cong. Rec. S. 3345 (March 25, 1986), does not contain any enforcement mechanism in it. One of its principal sponsors, Senator Hatch, stated on the floor that it is "designed to promote its own enforcement through political processes [and to] the extent that the amendment succeeds in creating a more useful flow of political information to the electorate, and this is a major objective of the amendment, it will be enforced most effectively at the polls every other November." 132 Cong. Rec. S 2164 (March 6, 1986). *See also* S. Rep. No. 99-163, *supra*, at 56-63, emphasizing role of political processes in enforcing the amendment.

"legislating in contingency" (J.A. 46), apparently meaning that the operation of the Act itself was contingent. But the real contingent legislation will be the future appropriations acts in which the final numbers will only be determined by the predictions of the expected deficits made by three unelected officials, rather than by the two Houses of Congress and the President. It is only in those cases where a spending bill is part of the final legislative package for the fiscal year that members will know whether the amounts in the bill will govern, or whether sequestration will have the final vote as a result of the permanent rider that Gramm-Rudman has attached to all appropriations bills for the next five and a half years.

An understanding of the reasons why Congress passed Gramm-Rudman also explodes the myth that the statute is not an undue delegation because Congress has made the hard choices, as it must since it is "the branch of our Government most responsive to the popular will." *IUD v. API, supra,* 448 U.S. at 685 (Rehnquist, J., concurring). First, the whole reason for passing Gramm-Rudman was that Congress could not make the hard choices, *i.e.*, it could not make specific decisions to cut specific programs or enact specific tax increases. It is true that Congress made some choices in Gramm-Rudman, for instance by excluding Social Security and some other programs, and by allocating the mandatory cuts equally between defense and non-defense spending. But if Congress had really made the hard choices, there would have been no reason to enact Gramm-Rudman at all. Thus, for fiscal 1986 Congress knew that before it could adjourn in December 1985, it had to pass a continuing resolution for the remainder of the fiscal year in which it could have made all of the cuts necessary to reach the target deficit in Gramm-Rudman if only it had the political will (or perhaps the political won't) to do so.

The fact that Congress chose to rely on Gramm-Rudman rather than the normal legislative process illustrates perfectly what the Act is designed to achieve: deficit reduction without accountability. As Justice Rehnquist observed in *IUD v. API*, it is "difficult to imagine a more obvious example of Congress sim-

ply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." 448 U.S. at 687. "It is the hard choices and not the filling in of the blanks," he continued, "which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." *Id.*[10]

Second, a fundamental principle of our system of democracy is the need to provide political accountability. When $11.7 billion of cuts became effective on March 1, many people were hurt. But when they looked around for someone to blame, there were no votes, recorded or otherwise, on specific spending reductions. The only legislation that caused these reductions were the votes for Gramm-Rudman, and members could say with some degree of believability that Gramm-Rudman dealt only with the overall need to reduce the deficit, and not specific cuts, and that they had not anticipated reductions of this magnitude in the programs affecting their constituents.

But even if the present Congress can be held accountable for this year's spending reductions, in January 1987 there will be a new Congress, which will truly be able to say that it did not vote even for the Gramm-Rudman process, Moreover, it will be able to assert that it cannot prevent undetermined cuts from going into effect each year because that requires two Houses plus the President to stop the Gramm-Rudman juggernaut by repealing it. Furthermore, the absolute three-fifths vote required in the Senate by section 271 of the Act for waivers of the applicable spending limitation provisions, creates another substantial barrier to altering Gramm-Rudman even for one fiscal year. While Gramm-Rudman does not legally bind future Congresses, it at least creates

[10] On March 20, 1986, Congress reached agreement on H.R. 3128, a version of the reconciliation bill on which it could not agree in December. *See* 132 Cong. Rec. H 1518-26. The measure will result in deficit reductions of $25 billion over three years, $19 billion from lower spending and $6 billion from added revenues. *Id.* at H 1523.

substantial burdens on the legislative process and enables either House or the President to insist upon the spending levels based on Gramm-Rudman, despite whatever else might ensue.

In upholding the delegation, the district court looked to the "necessary and proper" clause of the Constitution, Article I, Section 8, Clause 18. J.A. 45-46. That clause is generally cited as the basis for allowing delegations, *see Lichter v. United States, supra,* 334 U.S. at 757, and under it Congress has been given considerable leeway to decide for itself what is "necessary." But Congress's judgment that a delegation is necessary is not controlling since that clause has another independent requirement: the delegation must also be "proper." As far back as *McCulloch v. Maryland*, 17 U.S. (4 Wh.) 316, 421 (1819), this Court gave the "necessary" aspect of the clause a wide reading, but in doing so noted that "the end [also must] be legitimate" for the law to be valid. Thus, as the Court observed in *Chadha*, "the fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." 462 U.S. at 944. Under our system of democracy, it is never proper or "legitimate" for Congress to abdicate its legislative functions in order to achieve a particular substantive end simply because the system for enacting legislation embodied in our Constitution may have frustrated Congress's ability to achieve what it considers to be a desirable goal. As the D.C. Circuit observed about the legislative veto in *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n,* 673 F.2d 425, 476 (1982), *aff'd*, 463 U.S. 1216 (1983):

> To the extent that there is *not* a consensus, the failure to act is not an undesirable "delay" but rather exactly the outcome of the legislative process envisioned by the Framers. The bicameralism and presentation requirements in Article I, Section 7 are not unfortunate by-products of a poorly designed scheme but rather carefully constructed im-

pediments to the Legislature's exercise of power. (Emphasis in original).

This Court need not review the scores of delegation cases which have been decided to reach the conclusion, which no one disputes, that there is no case in which the purpose of making the delegation, and the effect of doing so, was anything remotely like this one. In every other case the delegations were made because, for a variety of reasons, Congress concluded that it could not in any practical sense do the job itself. The contrast is aptly pointed out by this Court's observation in *Bowles v. Willingham, supra*, 321 U.S. at 515-16: "We fail to see how more could be required. . . unless we were to say that Congress rather than the Administrator should determine the exact rentals which Mrs. Willingham might exact." Since that prototypical delegation case is so far from this one, the district court was fundamentally in error in treating them identically. In our view, this motive of avoiding political responsibility alone is enough to set aside the delegation. At least the presence of this kind of motive should cause the Court to scrutinize this delegation with far greater care than in the ordinary case. And, as we shall now show, the delegation here is much too broad and much too imprecise to be upheld whatever the standard of review.

B. Based On All Of The Relevant Factors, The Delegation Under The Act Is Excessive.

Quite apart from the absence of any legitimate necessity for the delegation at issue here, the trigger mechanism must fall under the traditional standards because it is not sufficiently confined to pass constitutional muster. As Judge Leventhal observed for a unanimous three-judge court in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971)("*Meat Cutters*"), there is "no analytic difference, no difference in kind, between the legislative function—or prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority con-

ferred by the legislature. The problem is one of limits." For the reasons set forth below, we believe that the proper limits have been exceeded, but before turning to that discussion, one other introductory point is in order.

As we read the cases, there is no single factor that is dispositive, and a proper analysis requires the Court to consider all of the factors, taken as a whole, in deciding whether a particular delegation is excessive. *See Meat Cutters, supra,* 337 F. Supp. at 745, reviewing "several interrelated considerations. . . ." While the district court nodded in the direction of deciding the issue by examining the "aggregate effect" of the relevant factors (J.A. 54), its analysis considered each factor on its own and, if found to be less severe than in other statutes where a delegation was upheld, dropped it from the constitutional calculus. We believe that such a "divide and conquer" approach is not only unwarranted under the case law, but is particularly inappropriate here because of the delegation's improper purpose.

1. *Subject Matter of Delegated Authority*

In one of the earliest cases dealing with the issue of delegated authority, this Court suggested that there are some areas which are so central to the legislative function that they may not be delegated: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard,* 23 U.S. (10 Wh.) 1, 43 (1825) (Marshall, C.J.). At issue in this case is not simply a general exercise of lawmaking authority under such powers as the Commerce Clause. Rather, Congress is purporting to delegate an authority explicitly limited to it in Article I, Section 9, Clause 7 of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." We do not suggest that there can be no delegations involving the power of the purse that do not run afoul of the undue delegation doc-

trine, but the fact that the power involves a core function of Congress should cause the Court to review the delegation with greater concern than it might where the function was not one assigned to Congress, as opposed to another branch of the federal government.

Furthermore, this is not a situation as in *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928)("*J.W. Hampton*"), where there were only item-by-item adjustments to be made. The delegation here goes to the heart of the appropriations function by allowing across-the-board spending levels, for virtually the entire federal government, to be set by administrators not legislators. If the Constitution does not require the Congress to vote on basic spending decisions, there are no congressional powers for which this factor is relevant.[11]

Furthermore, while the result of other delegations has been to alter existing laws, no statute has ever attempted to override laws to be passed by Congress in the future, based solely on the operation of delegated authority. But in this case, the continuing resolution which was passed seven days after Gramm-Rudman became law, as well as every other spending provision for fiscal 1986, both prior to and subsequent to December 12, 1985, were overridden based on the administrative determination that the budget target has not been met. This is precisely the kind of action, short of full legislation, which this Court condemned in *Chadha* because it "had the purpose and effect of altering the legal rights, duties, and relations of persons. . . outside the Legislative Branch." 462 U.S. at 952. As the *Chadha* opinion further stated in relation to the legislative veto, in language applicable to this Act as well, its "legislative character. . . is confirmed by the character of the congressional action it supplants"

[11] The district court found this point irrelevant (J.A. 43-44), relying in part on this Court's decision in *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953), which upheld a delegation to the District of Columbia even though the Constitution gives Congress the "exclusive" authority to legislate regarding the seat of government. *Id.*, n.10. But as that opinion makes clear, the Framers included the word "exclusive" primarily to preclude an argument that the states ceding jurisdiction over the land would maintain concurrent jurisdiction over it, not to prevent Congress from delegating the power to another body created by it. *Id.* at 109-10.

(*id.*), which in this case is subsequent and prior spending legislation duly authorized by Congress and signed by the President. No case of which we are aware has ever approved the authority to nullify future legislation, based solely on an administrative determination, let alone allowed it for so central a legislative function as the power of the purse.

2. *Range of Choice*

The closest case in terms of subject matter, because it dealt with the power to tax, is *J.W. Hampton, supra*. However, the effect of the delegated authority there was quite limited since the Secretary was only given the authority to increase the import duty by 50% above that set by statute, *i.e.*, from four to six cents per unit. By way of contrast, in this case there are billions of dollars at stake, limited only by the deficit targets in the Act. But even that limitation is more illusory than real. This can be gleaned from the conference report on the concurrent budget resolution for fiscal 1986 which contains revenue estimates for fiscal years 1986, 1987, and 1988 of $795.7, $869.4, and $960.1 billion respectively. H.R. Rep. No. 99-249, 99th Cong., 1st Sess. 5 (1985). The target deficits in Gramm-Rudman are based on an assumption that approximately those revenues will be realized, but it is plain that if they are substantially off in either direction, Congress's 1985 estimates of how much deficit reduction will be needed each year will be nearly worthless. Moreover, Gramm-Rudman contains no authority to increase revenues, but simply mandates spending reductions as the sole cure to reduce the deficit. Thus, if the administrative process produces revenue estimates which are substantially different from those made last year, the required reductions will be very different from those now projected.

These changes are particularly important in light of the fact that major items, such as Social Security and interest on the national debt, are wholly excluded from the Act. Therefore, any significant reduction in anticipated revenues would produce disastrous results on a percentage, as well as absolute dollar basis, for the programs which are subject to Gramm-Rudman.

Accordingly, because the projections of the amount of deficit reductions that Congress envisioned may be substantially off the mark, the administrators of this Act have the power to produce far greater reductions than Congress ever expected, depending on how they do their estimating. Furthermore, because of the $10 billion "cushion" built into section 251(a)(1)(B) before any cuts are made, a minor alteration in the deficit estimate from one just below that figure to one just above it, can unleash the entire $10 billion in spending cuts. Thus, the incredible sweep of the effect of this delegation is also a factor that weighs heavily against the validity of the statute.[12]

3. *Nature of Decisions to be Made by the Administrator*

In *J.W. Hampton* and many other cases, the courts have sustained delegations by pointing to the essentially factual nature of the decision, *i.e.*, that it is something subject to verification, or at least on which a reasonable consensus exists. We recognize that in *Yakus v. United States, supra*, 321 U.S. at 425, this Court upheld a delegation that called for "the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." Nonetheless, the difference between the determinations to be made here and those in the cases in which delegations have been upheld is not one of degree, but of kind, since what must be done under this Act is, in essence, to predict what the economy will look like in the future, not to describe how it performed in the past, or even how it is performing now.

In order to estimate the budget deficit, the following predictions must be made: What will the gross national product be for

[12] The legislative history of the Act contains several striking examples of how far off deficit estimates can be. In 1981, the deficit projection leaped from $60 billion to $140 billion in about two weeks. *See* 131 Cong. Reg. S 12568 (Oct. 3, 1985, remarks of Senator Gramm). In 1985, in 60 days, there was an increase of $20-30 billion in the deficit from the predicted level of $171.9 billion. *Id.* at S 12571, remarks of Senator Rudman. Indeed, Senator Rudman was frank to concede that he was unable to provide "a worst case scenario. It would be almost impossible." 131 Cong. Rec. S 12707 (Oct. 5, 1985).

the forthcoming fiscal year? How much money will be raised from taxes and other sources? What will the inflation rate be? How will interest rates affect the unchanged obligation to pay for the national debt? As the President's own budget admits, these are not questions with answers on which even experts can agree. *See* pp. 8-9, *supra*. In part they depend on how optimistic or pessimistic the forecaster is, or on how likely he believes the present policies of the Administration are to succeed. They are the kinds of judgments that the President and Congress are supposed to make every year in hammering out a budget, and are political in the best sense of the word.

Indeed, it was precisely because the House recognized that these estimates are so subject to political manipulation that it initially gave the decisional authority to CBO, with OMB playing only a consultant's role. 131 Cong. Rec. H 9597 (Nov. 1, 1985, remarks of Rep. Rostenkowski); *accord* GAO Br. at 39. It was only willing to allow OMB and CBO to have equal roles if GAO, which is independent of OMB, became the final arbiter of their differences. Even then Congress insisted that there be a joint report by OMB and CBO, and that in the event of their almost inevitable differences, the final figure would be the average of their initial estimates. *See* section 251(a)(5). This too is powerful evidence that the judgments to be made are inherently imprecise and virtually open-ended in nature, and therefore, any notion that these decisions are "something for a guy with a green eye shade" (Transcript of district court argument ("Tr.") at 72), is simply mistaken. This alone may not be sufficient to bring down the Act, but it is surely a major factor that must be considered by the Court in assessing the propriety of the delegation.

4. *Standards Imposed by Congress*

In defending the statute below, appellants argued, and the district court agreed, that there were adequate standards in the Act for determining whether each year's budget deficit will meet the target in the Act. As support, they pointed to section 251(a)(6), which describes how the budget base will be deter-

mined. Appellees agree that, while that provision answers a number of questions, almost all of the guidance concerns assumptions about which legislative proposal to utilize in the event that Congress has not completed work on the forthcoming year's appropriations bills, or how to deal with specific contingencies when there are clear alternatives. That section does not, however, provide any guidance on the decisive questions about what economic and political assumptions should be used in estimating both revenues and expenditures. In short, section 251(a)(6) is no more help in answering this question than would be the case if a pupil were asked to convert a fraction to a decimal, and the teacher provided only the numerator and not the denominator.

Looking to the remainder of the Act, the crucial determinations are not mentioned specifically, let alone are there any standards included by which adherence to the congressional will can be ascertained. There is here, in the words of this Court in *Panama Refining Co. v. Ryan, supra*, 293 U.S. at 415, "no criterion to govern the President's course." Indeed, the statute does not even tell the administrators what kinds of determinations must be made, other than to subtract from the anticipated deficit the target amount specified in the statute. Nor does the Conference Report fill that void in its discussion of the issue (pp. 81-82). And our reading of the other principal source of legislative history—the nine days of debate on the Senate floor in September and October—found nothing further to illuminate the matter. Nor is this a case, like *American Power & Light Co. v. SEC, supra*, relied on by the district court (J.A. 50), in which the broad words of the Act were given meaning by the purpose of the Act, the context in which the terms are used, and the requirements that are imposed on the agency. By way of contrast, there is a plethora of detail on which programs should be excluded, and how to calculate and allocate the various spending reductions that will take place, but nothing about how Congress wanted these officials to predict the future of the economy. In order to find out what the Directors are to do, it is necessary to review the budget and its back-up documents to see precisely

what must be determined in order to come up with the final deficit figure. And in doing so, it is necessary to make a substantial number of subsidiary estimates, and, as to those, there is absolutely nothing in the Act that prevents the Directors from assuming virtually, if not actually, anything they want regarding the operation of this law and the forces that will bear on the economy in the forthcoming fiscal year.[13]

5. *Length of Delegation*

This Court has also been willing, in emergencies, to allow Congress to delegate short-term powers to the executive when there was a "grave national crisis with which Congress was confronted." *Schechter Poultry, supra,* 295 U.S. at 528. The Court also recognized, however, that "[e]xtraordinary conditions do not create or enlarge constitutional power." *Id.* The reason for that was clearly enunciated in *Lichter v. United States, supra*, 334 U.S. at 780: "In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety."

The fact that a delegation was for a short time was one of the factors cited by Judge Leventhal in upholding the statute in *Meat Cutters, supra*, 337 F. Supp. at 754. There, the initial delegation had been for six months, and, with two extensions, had been extended to a total of less than ten months; in addition, the court observed, "Congress established a 'close control'" through its short-term delegations which required "an affirmative review without prolonged delay, without the option of acquiescence by inaction." *Id.* By way of contrast, the delegation here is for six

[13] It is also worthy of note that there will be no public participation whatsoever in these vital determinations. Indeed, CBO Director Penner predicted that these estimates, which were formerly obtained through an open process, would have to be done in secret because of the serious impact that they would have. House Hearings at 180. As a result, the process may create another objection to this delegation based on the observation of Chief Justice Taft in *Wichita Railroad & Light Co. v. Public Utilities Comm'n*, 260 U.S. 48, 59 (1922), that the Constitution may well require that a delegation be accompanied by "a certain course of procedure and certain rules of decision in the performance of its function."

fiscal years, and the whole purpose of the law is to *preclude* Congress from regularly revisiting the issue in order to insure that congressional inaction will still result in deficits that meet the levels set forth in the Act. Thus, the length of the delegation further weighs against upholding it.[14]

6. *Absence of Judicial Review*

There is no case of which we are aware in which a delegated power remotely resembling this has not been subject to judicial review. Indeed, as recently as 1983, in discussing the issue of delegation, this Court observed in *Chadha* that delegated power "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authorization entirely." 462 U.S. at 953-54, n.16. Here, section 274(h) explicitly forbids both judicial and administrative review of any kind over the fundamental determinations which trigger the operation of the sequestration order. This denial of judicial review is important for two separate reasons.[15]

First, the absence of judicial review underscores the essentially legislative nature of these delegated decisions. Without judicial review these determinations are precisely parallel to those for ordinary congressionally enacted budget decisions. The courts are plainly in no position to decide whether Congress's projections of income and expenses are reasonable, whether the projected inflation rate is appropriate, whether revenue estimates are excessively optimistic or pessimistic, or whether the rate of interest will in fact be as predicted. In other words, the denial of judicial review here further emphasizes that the

[14] At least in the area of military appropriations, the Framers thought that regular review was essential since it limited such appropriations to two years in Article I, Section 8, Clause 12.

[15] The district court correctly noted that section 274(h) does not preclude all review. J.A. 52. However, the fact that the application of a sequestration order to Social Security, for example, could be challenged on the ground that the statute excludes that program from the Act does not alter the fact that the amount of, or indeed even the necessity for, a given sequestration order is entirely committed to the discretion of three unelected officials.

key determinations under the Act are legislative or even political, but surely very different from the kind ordinarily made by administrative agencies. And the fact that other statutes cited by the district court (J.A. 53), have been construed to preclude judicial review over other agency decisions, is immaterial since none of the delegations in those cases approached the magnitude of this one.

Second, the result of a denial of judicial review here is to grant unelected officials uncontrolled discretion, without accountability or any checks and balances. The ordinary legislative process is, as described by this Court in *Chadha*, one that is "exercised in accord with a single, finely wrought and exhaustively considered, procedure" involving two Houses plus the President. 462 U.S. at 951. Because of that balanced consideration, judicial review of legislative determinations is extremely narrow, available only based on a claim that the law violates some specific guarantee under the Constitution. The kind of balanced consideration produced in the legislative process is plainly lacking here, not only because of the extraordinarily short time in which these determinations are to be made, but also because they are not made by elected lawmakers, but by appointed officials who are unaccountable to the public.

Beyond its role as a partial surrogate for the need for a balanced determination, judicial review prevents the kind of uncontrolled discretion which has been anathema even to those who support the concept of broad delegations to administrative agencies: "Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority." *United States v. Rock Royal Cooperative*, 347 U.S. 533, 576 (1939). Similarly, the court in *Meat Cutters* emphasized the importance of judicial review on no fewer than five separate occasions. *See* 337 F. Supp. at 746, 755, 757, 759 (2 notations). And, as Justice Rehnquist remarked in *IUD v. API, supra*, "courts charged with reviewing the exercise of delegated legislative authority will be able to test that exercise against ascertainable standards," 448 U.S. at 686, a requirement plainly not met here.

In the same vein, the Court in *Yakus v. United States, supra,* 321 U.S. at 425, observed that the courts are needed to "ascertain whether the will of Congress has been obeyed. . . and whether [the agency] has kept within it in compliance with the legislative will." And in sustaining a broad delegation under the Renegotiation Act, this Court in *Lichter v. United States, supra,* underscored that the "provisions for a redetermination of excess profits by the Tax Court de novo. . . imposed important limitations on the allowable recoveries [by the government]." 334 U.S. at 787. Here, the preclusion of any form of administrative or judicial review of the determinations which will trigger massive budget cuts results in essentially unlimited delegation, which cannot be upheld consistent with the cases that have required judicial review as a necessary check on unbridled administrative discretion.

* * *

If the delegation in this case is upheld, the situation will approach that envisioned by the Court in *Panama Refining Co., supra:* "[i]nstead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us [although that is surely a major factor in this case], but of the constitutional processes of legislation which are an essential part of our system of government." 293 U.S. at 430. Henceforth, Congress could adopt the same approach in the tax laws and allow the Secretary of Treasury to determine how much particular taxes or benefits shall be raised or lowered.[16] Indeed, it could adopt this approach in regulatory statutes, allowing the estimate of the future gross national product to alter the question of whether costs are a

[16] Apparently, the Act's sponsors considered bringing in taxes as well, but decided against doing so because of a fear of a Presidential veto. *See* 131 Cong. Rec. S. 12713-14 (Oct. 5, 1985) (colloquy between Senators Rudman and Mitchell).

legitimate matter of concern for regulators, permitting them when the gross national product decreases, and denying them or allowing them to be considered to a greater degree, when the contrary is the case. Such requirements could apply to rules for civil rights, occupational health, and the environment, as well as to the more traditional economic regulatory fields such as railroad, bus, and trucking rates.

Indeed, if this delegation is allowed, Congress could put the entire government on automatic pilot, subject to the expert estimations of unelected officials, without any possibility of judicial review. As CBO Director Penner observed in surveying these powers, even before judicial review was excluded, "[i]t is hard to think of other instances where unelected officials have such power to do good or evil." House Hearings at 157. There are, we submit, substantial limitations on the responsibilities that Congress may delegate short of those that were overturned in *Schechter*. Even if arguments of convenience and efficiency were constitutionally permissible, as *Chadha* makes clear they are not, 462 U.S. at 944-46, this delegation is invalid as an example of a "convenient shortcut," which our Founding Fathers concluded cannot be used consistent with our principles of democratic government. *Id.* at 958. The doctrine of undue delegation remains a valid constitutional principle, and the delegation in this case—which is in fact a legislative abdication of the power of the purse—has far exceeded the permissible limitations imposed by Article I and therefore must be set aside.

II. THE SUBSTANTIVE ROLE OF CBO IN THE DEFICIT REDUCTION PROCESS VIOLATES SEPARATION OF POWERS.

The previous argument assumes that the delegation was made to an agency of the executive branch. All parties agree that, under *Buckley v. Valeo*, 424 U.S. 1, 118-43 (1976), the delegated functions under this Act may not be assigned to an official who is controlled by the legislative branch. The district court found that the delegation to the Comptroller General

violated principles of separation of powers because the Comptroller General is subject to the influence of Congress and thus cannot constitutionally perform his duties under the Act. For the reasons set forth in the briefs of NTEU and the United States and the opinion below, we support that ruling. However, this Court need not decide the status of the Comptroller General to find that separation of powers has been violated. Thus, even though the final report to the President is signed by the Comptroller General, the substantial statutory role that CBO, an acknowledged arm of Congress, has in making the essential decisions contained in that report results in an unconstitutional attempt by the legislature to share in the administration of the Act, which the limited role of the Comptroller General cannot cure.

In a footnote (J.A. 55, n.18) the district court dismissed the argument that the involvement of the CBO amounted to an improper sharing in the administration of the Act by a legislative official. In their memorandum below, the congressional appellees had argued that, under the structure of the Act, the Comptroller General would be no more than a rubber stamp, and that, even if he did more, the role of the CBO was so substantial that an improper "sharing" of functions resulted, of the kind condemned by this Court in *Chadha*. 462 U.S. at 958. In light of the affidavit submitted by the Comptroller General, in which he detailed the close working relationship between GAO and CBO under the Act (*see* p. 13, *supra*), plaintiffs pressed their "shared administration" rather than their "rubber stamp" contention at oral argument (Tr. 31-34). However, the district court ruled only on the latter claim, which it found "unconvincing," although agreeing that, if factually true, it would render the Act unconstitutional.

Appellants seek to defend the involvement of CBO by referring to its role as "advisory." Senate Br. at 40; House Br. at 6; GAO Br. at 40; *see also* District Court Mem. of United States, Jan. 8, 1986, at 32, n.10. But as we now demonstrate, the realities of the decision-making process required under the Act, as confirmed by the Comptroller General's own affidavit, make it clear that CBO's role is far from purely advisory, and therefore it renders the trigger mechanism unconstitutional.

In assessing the role of CBO, it is useful to recall that the original bill passed by the Senate gave the Directors of OMB and CBO the dual authority to make the operative determinations under the Act. As CBO Director Penner advised Congress at the time, the Act "would significantly change CBO's role by endowing it with powers far beyond anything envisioned when the institution was created." House Hearings at 156. No one seriously questions that under *Buckley* and *Chadha* the CBO-OMB trigger mechanism would be unconstitutional, as would the version passed by the House on November 1, 1985, which gave sole decisional responsibility to CBO, subject only to a duty to consult with OMB. *See* 131 Cong. Rec. H 9590, § 251(a)(3). In response to the House's version, the Senate added the Comptroller General on top of CBO and OMB in an effort to save the statute's constitutionality. *See* 131 Cong. Rec. S 14911 (Nov. 6, 1985, remarks of Senator Gramm). The question thus becomes, did the addition of the Comptroller General sufficiently alter the decisional process that it changed an unconstitutional scheme into a constitutional one? In order to answer that question, a brief review of the duties of CBO, OMB, and GAO in general and under the Act is essential.

Until this Act was passed, the Comptroller General had no responsibility for the budget, whereas both OMB and CBO have had as their major, and in the case of CBO, virtually only, function working on proposed and enacted budgets. Following approval of the concurrent budget resolution in the spring, OMB and CBO review the pending legislative and economic developments as part of their regular duties, and under the Act that review is used to prepare their joint report which is due on August 15.

At that point GAO has its first formal involvement in the process. It then has five days, two of which are holidays in the first two cycles, to review the OMB-CBO report and issue its own report to the President. Based on the statutory deadlines, and the fact that GAO is given no additional resources to take on its new duties, Conf. Rpt. at 84, it could be argued that the Comptroller General is little more than a rubber stamp. But if, based on the

Bowsher affidavit, that characterization cannot be sustained, GAO's extensive cooperation with CBO creates another problem—a sharing of administrative functions with an arm of Congress. And, more importantly, it seriously undercuts any claim that adding GAO to the process saved the Act by transforming the role of CBO (and by necessary implication that of OMB) into that of a mere adviser.

Further proof that Congress did not intend the OMB-CBO report to be merely advisory is contained in the standard of review which Congress imposed on GAO in section 251(b)(1). Thus, the Comptroller General must give "due regard for the data, assumptions, and methodologies" used by the Directors, and if he wishes to make any changes, he must "explain fully" the differences between the two reports. Section 251(b)(2). Similarly, the Conference Report (at 74) confirms that Congress did not intend the OMB-CBO report to be merely advice that GAO was free to accept or reject at will: "The conferees intend that the Comptroller General use the utmost discretion in the exercise of his authority to change from the contents of the report of the Directors." And in the memorandum prepared for members of both Houses in connection with the final floor debates, the OMB-CBO report was described as "in essence" constituting "a draft order." 131 Cong. Rec. S 17386 (Dec. 11, 1985); *id.* at H 11876 (in Dec. 12 edition). This view is entirely consistent with that of Senator Gramm who described the GAO's role to the Senate as the "final arbiter of the figures in the report to the President." 131 Cong. Rec. S 14911 (Nov. 6, 1985). It is also consistent with the memorandum offered on the Senate floor in November which described the amendment adding GAO as follows: "Maintains the present legislation's use of both OMB and CBO as the institutions that develop the sequester percentage, but places responsibility for reporting to the President and the Congress in the Comptroller General." *Id.* at S 14908. While other statements suggest a marginally greater role for GAO, taken as a whole this legislative history demonstrates that CBO and OMB were to continue to be the dominant actors and not, as appellants suggest, merely advisers to GAO.

Finally, the clearest evidence that Congress did not consider OMB and CBO as advisers, and GAO as the sole decider, is contained in the fall-back provisions that apply if the Act is declared unconstitutional. Under section 274(f), the GAO has no role whatsoever in that process; rather, the specially created joint budget committee looks solely at the OMB-CBO report. That approach makes sense only if Congress believed that OMB and CBO would be the principal participants in the process, and not simply advisers to GAO. Indeed, the requirement that their report must contain an average on those matters on which they differ can only be explained as a further recognition of the central, not advisory, role that their report plays in the process. It is thus apparent that the last minute addition of GAO to respond to the constitutional objections to the participation of CBO cannot transform CBO's status into that of a mere adviser.

Furthermore, as a practical matter, whatever comes to GAO will almost certainly have the major imprint of CBO. The report is a joint determination of CBO and OMB, with individual estimates where there are disagreements between them. If the Directors agree, GAO is likely to follow what they propose, especially with the congressional directive requiring an explanation of any changes, and the relative expertises in budget matters of the Directors, on the one hand, and GAO on the other. Undoubtedly, CBO and OMB will try to reach agreement, and their agreement will in turn reflect compromises on both sides. Thus, even though the Comptroller General has the right to overrule their estimates, it is highly unlikely that he will try to do so.[17]

The conclusion is inescapable that the Act creates a sharing of responsibilities, which if permitted to stand, would be contrary to this Court's admonition in *Chadha* that the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 462 U.S. at 951. To permit CBO to participate in this process would be "to expand [Congress's] role

[17] On issues such as interpreting the Act, when OMB and CBO have much less claim to expertise, GAO is more likely to exercise its own judgment, as it in fact did in several instances for fiscal 1986.

from one of oversight with an eye to legislative revision, to one of shared administration [, resulting in an] overall increase in congressional power [which] contravenes the fundamental purpose of the separation of powers doctrine." *Consumer Energy Council of America v. FERC, supra*, 673 F.2d at 474. This effort to give CBO a substantive role is, like the veto, "an attempt by Congress to retain direct control over delegated administrative power" which may not be done consistent with principles of separation of powers. *Id.* at 476.

The final reason why the Court should be particularly reluctant to condone the arrangement as consistent with principles of separation of powers relates to the status of the Comptroller General and the ability of Congress to influence him, at least in a general way, even if not on specific decisions. Beside the fact that the Comptroller General has generally been described as part of the legislative branch or as an agent of Congress (J.A. 71, n.29), there are three principal attributes of his office which provide the basis for the conclusion that he will look to Congress for guidance, if not actual orders. First, although appointed by the President, his name is selected from among three nominees sent to him by Congress. *See* 31 U.S.C. § 703(a)(3). Second, GAO's budget is sent to Congress by the President without change, thus allowing the legislative branch alone to decide on the funds needed for the Comptroller General to carry out his duties. *See* 1986 Budget, pages 5-145, 8-12. Finally, pursuant to 31 U.S.C. § 703(e)(1)(B), the Comptroller General may be removed by a joint resolution of Congress, after notice and an opportunity for a hearing, for any of five separately enumerated reasons, which include the open-ended category of "inefficiency." He may not, however, be removed for any reason by the President, whose only role in the process is either to assent to, or veto, a joint resolution of removal, and in the latter case that decision could be overridden by a two-thirds vote of both Houses.

As the district court concluded (J.A. 75), this cumulative influence by the legislative branch in the business of the GAO is unconstitutional under the "sound application of a principle that makes one master in his own house precludes him from impos-

ing his control on the house of another who is master there." *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935). That influence can only be increased by the involvement of CBO in the Gramm-Rudman process, with the inevitable, if subtle, pressure on the Comptroller General to side with CBO in its differences with OMB. Proof of that is not, of course, possible, but neither is proof to the contrary. Indeed, it is precisely because such encroachments are often undetectable that makes insisting upon separation of powers so vital. As this Court observed in *Buckley v. Valeo, supra*, 424 U.S. at 129, ". . . the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Surely, in light of the purpose of the Act, which is to enable Congress to reduce the budget deficit without being politically accountable for cutting popular programs or raising taxes, it would be doubly destructive of democracy to allow Congress to do this through the back door by using its agent, CBO, to influence the supposedly independent determinations of GAO. Because both the structure of the Act and the way that it necessarily operates openly invite such an outcome, the substantial role of CBO contravenes the principles of separation of powers and renders the trigger mechanism unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed and the trigger mechanism in sections 251 and 252 of the Act declared unconstitutional.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees Mike Synar, Member of Congress, *et al.*

April 9, 1986

ADDENDUM
Themes From Gramm-Rudman Floor Debates

1. The Ordinary Legislative Process Has Failed to Reduce the Size of the Deficit.

"This past budget debate showed with excruciating clarity that Congress is incapable of reducing the deficit with the tools it currently has. With our amendment, we are adding some new tools to the toolbox." 131 Cong. Rec. S 12087 (Sept. 25, 1985, remarks of Sen. Zorinsky).

"It is not the greatest way to manage a magnificent country. But we have political gridlock at this point, and the existing processes of our Government, executive and legislative, invite the continuation of the gridlock." 131 Cong. Rec. S 17386 (Dec. 11, 1985, remarks of Sen. Domenici).

"We come to today because there is no other alternative." 131 Cong. Rec. S 17403 (Dec. 11, 1985, remarks of Sen. Rudman).

"A majority cannot be mustered for any single viewpoint and the red ink continues to gush forth." 131 Cong. Rec. S 17432 (Dec. 11, 1985, remarks of Sen. Chafee).

"Mr. President, I was asked this afternoon by a reporter if Gramm-Rudman-Hollings is not a straitjacket. If it is, Mr. President, it is a straitjacket required to restrain a madman from doing irreparable harm to America. Congress is the madman. We have engaged in the madness of unrestrained spending." 131 Cong. Rec. S 17440 (Dec. 11, 1985, remarks of Sen. Wilson).

"Our actions speak louder than our words. It is obvious that Congress is incapable of exercising budgetary restraint. With passage of the Gramm-Rudman bill, I am now hopeful that we can finally begin to solve our serious deficit problem." 131 Cong. Rec. H 11880 (Dec. 11, 1985, remarks of Rep. Barton).

"This bill sets up procedures that a properly functioning legislation [sic] institution should not need. It is a sad reflection on this body that it is unable to establish spending priorities making outlays meet revenues like all American families do every day." 131 Cong. Rec. H 11881 (Dec. 11, 1985, remarks of Rep. Daub).

"The need to do it is a confession on our part that we have not been doing our job." 131 Cong. Rec. H 11882 (Dec. 11, 1985, remarks of Rep. Latta).

"The President out of ideological rigidity has failed to propose responsible budgets. This Congress out of political timidity has refused to adopt responsible budgets and so as a result of that mutual failure, we have Gramm-Rudman." 131 Cong. Rec. H 11887 (Dec. 11, 1985, remarks of Rep. McHugh) (opponent).

"Mr. Speaker, this bill is in a real sense an act of legislative desperation. . . it seeks to place a political straitjacket on both the executive and the legislative branches of Government and force both branches to face unpleasant facts. To the degree that that may be necessary, it is the inevitable result of our fiscal excesses, particularly those of the last five years which have doubled the national debt." 131 Cong. Rec. H 11903 (Dec. 11, 1985, remarks of Rep. Wright, House Majority Leader).

2. As A Result of Public Pressure To Increase Spending, Often from Special Interest Groups, Congress Lacks the Will and Discipline to Vote to Reduce Spending or Increase Taxes.

"It will once and for all remove the politics and the finger pointing from the Federal deficit. It will enable us to cut away the rhetoric and get to the task at hand by providing us with the discipline that we are so sorely lacking to make the budget process work." 131 Cong. Rec. S 12084 (Sept. 25, 1985, remarks of Sen. Hollings).

"...the numbing figure of two trillion dollars...is the most convincing argument that the discipline needed to make the budget process work is simply not there." 131 Cong. Rec. S 12084 (Sept. 25, 1985, remarks of Sen. Hollings).

"Certainly, Congress wields the authority and the means to address the problem. It lacks, however, the resolve to employ them.

"The legislation that my colleagues and I are today introducing would enforce upon the Congress the resolve necessary to bring the Federal budget back into balance." 131 Cong. Rec. S 12088 (Sept. 25, 1985, remarks of Sen. Cohen).

"Time and time again, we take our turn coming to the Senate floor and denouncing the evils of deficit spending and the need for reform. Yet when it comes to making hard choices, we have been unwilling to come to grips with this problem." 131 Cong. Rec. S 12089 (Sept. 25, 1985, remarks of Sen. McClure).

"We got here because of the failure in the process—because of the failure of the President of the United States, in my judgment, to do his duty; because of the failure of the Congress, in my judgment, to do its duty; because of the failure of the people of this country to understand what it is all about. ... In a word, Mr. President, we got here because the people, the Congress, the President, and the press all want that which never was and never can be. That is, they want a balanced budget without cuts, without pain, without taxes, without taking the blame, without taking the responsibility, without measuring up to those duties of statesmanship which require occasionally that we say 'no' to our most profligate desires to spend and to avoid pain." 131 Cong. Rec. S 17383 (Dec. 11, 1985, remarks of Sen. Johnston) (opponent).

"What we ought to do in Congress, in my judgment, is live up to our Constitutional duty. The duty of this Congress is to raise money and to appropriate money, among other things—that is, to set priorities, to micromanage the budget, to decide what things

are more important and how important and when, and how revenues should be raised and when." 131 Cong. Rec. S 17385 (Dec. 11, 1985, remarks of Sen. Johnston)(opponent).

"It is simply because those consequences are so adverse, not just to defense but to many non-defense programs, that we will finally have the motivation to do the job right up front." 131 Cong. Rec. S 17401 (Dec. 11, 1985, remarks of Sen. Gorton).

". . . the bill is a formal admission that the Congress does not know how to balance the budget; that we simply do not have the guts to make the hard choices to bring our fiscal house into order." 131 Cong. Rec. S 17404 (Dec. 11, 1985, remarks of Sen. Glenn) (opponent).

". . . [the] bill . . . requires us to spend more responsibly, and perhaps induce discipline in spending, without the political consequences that might accrue under the present conditions. In other words, that we might be able to have less temptations against cutting spending." 131 Cong. Rec. S 17411 (Dec. 11, 1985, remarks of Sen. Denton)(opponent solely because of fears of excess defense cutting).

"This simple yet powerful measure will impose on Congress the discipline which we have so amply demonstrated we do not possess." 131 Cong. Rec. H 11880 (Dec. 11, 1985, remarks of Rep. Barton)(not delivered).

"We are in a logjam; everybody acknowledges that. Just listen to the speeches you have heard tonight. We know where the answer is to deal with the deficit. We have got to limit defense spending, we have to limit entitlements and we have to raise revenues to pay the bills. Those three have to be put together if you are really serious about dealing with the deficit. But nobody wants to move; nobody wants to move." 131 Cong. Rec. H 11883 (Dec. 11, 1985, remarks of Rep. Panetta).

"It is an act of desperation, but now is the time to act even if it is in desperation. . . . The system is not working the way it is. This is going to impose a discipline on us that we do not like, but I think it is time for us to impose it on ourselves, because if we do not, there will be no future for this country to defend." 131 Cong. Rec. H 11887 (Dec. 11, 1985, remarks of Rep. Shaw).

3. Gramm-Rudman Was Intended to Create A Mechanism That Will Operate Automatically to Reduce Deficits Even If Congress Fails to Do So By the Ordinary Legislative Process.

"The most important feature of our proposal, Mr. President, is its creation of a mechanism which will automatically institute the budget cuts necessary to achieve the prescribed deficit targets." 131 Cong. Rec. S 12084 (Sept. 25, 1985, remarks of Sen. Rudman).

"The amendment we are offering provides a mechanism which will force Congress simply to live up to its responsibility to reduce the deficit." 131 Cong. Rec. S 12087 (Sept. 25, 1985, remarks of Sen. Zorinsky).

"Its genius is not in the special detail, in the dates by which certain actions must be taken, or in the mechanics of the proposal. Its genius is in its theory. The amendment before us would accomplish this: change profoundly the consequences of a deadlock over budget priorities, and the consequences of inaction. To this point the consequences is deadlocked [sic], the consequences of inaction, have been that budget deficits went on as they did before, growing for all practical purposes on automatic pilot, frustrating the people of the country, choking the economy, and frustrating even the members who vote for them.

"Under Gramm-Rudman-Hollings, if the Members of the Congress of the United States cannot reach their goals, cannot reach the goals of that amendment which would result in a balanced budget by Fiscal Year 1990, through a course of creative compromise, then the amendment's formula will do it for us. . . . After the passage of this amendment the conse-

quences of inaction or of a deadlock will be that we will nonetheless proceed in the direction of a balanced budget and of a stronger economy." 131 Cong. Rec. S 12574 (Oct. 3, 1985, remarks of Sen. Gorton).

"[The concept of Gramm-Rudman] held the promise of forcing some responsibility from both Congress and the President. The concept was simple but forceful: if Congress will not act prudently, then we will impose across-the-board impartial cuts in order to reduce deficits." 131 Cong. Rec. S 17386 (Dec. 11, 1985, remarks of Sen. Domenici).

"It sets up a process, and that process is a disciplining process that requires that across-the-board cuts stand in place if we do not do our jobs." 131 Cong. Rec. S 17389 (Dec. 11, 1985, remarks of Sen. Gramm).

"The Gramm-Rudman-Hollings amendment is akin to the Sword of Damocles with the threat of sequester hanging over us by a thread." 131 Cong. Rec. 17400-01 (Dec. 11, 1985, remarks of Sen. Gorton).

"Mr. President, the legislation which we are passing today is a club over the head of both the President and the Congress designed to force action to reduce the deficit and to produce a balanced budget by 1991." 131 Cong. Rec. S 17420 (Dec. 11, 1985, remarks of Sen. Levin).

"The Founding Fathers never envisioned a government bound by a formula, and yet that is exactly what this conference report would impose on the country. Mr. President, this process represents the most significant abdication of the responsibility of Congress to determine the fiscal priorities of the nation that I have seen in my 33 years on Capitol Hill. My constituents elected me to represent their interests and the national interests, using whatever good judgment I could bring to bear on matters on which we have the vote, and not using some automatic for-

mula." 131 Cong. Rec. 17442 (Dec. 11, 1985, remarks of Sen. Byrd) (opponent).

"Mr. Speaker, the vice of Gramm-Rudman is it confines to a mindless, unfeeling, unthinking, bloodless formula the judgments—the sensitive, hard judgments—that we were elected to make. When we go [to] the voters and we say, 'trust us. We'll exercise our judgment based on our conscience and our experience,' and then we lateral over to a computer the judgments on defense and on so many important issues, that is cowardice, and I cannot buy it." 131 Cong. Rec. H 11885 (Dec. 11, 1985, remarks of Rep. Hyde)(opponent).

"Mr. Speaker, if Webster's could define Gramm-Rudman, it would be something like this: an abdication of congressional responsibility, a loophole through which Congressmen can slide. Mr. Speaker, you cannot legislate political courage." 131 Cong. Rec. H 11889 (Dec. 11, 1985, remarks of Rep. Hartnett) (opponent).

"The fundamental mission of government is to choose among conflicting priorities. Gramm-Rudman abandons this goal by divesting the Congress of all responsibility for making difficult decisions about spending and revenues, preferring to focus on procedures rather than substance." 131 Cong. Rec. H 11892 (Dec. 11, 1985, remarks of Rep. LaFalce)(opponent, not delivered).

creases, for fear of losing the support of any elements of their constituency.[3] As a consequence, while recognizing that the deficit must be reduced, Congress had not been able to agree on the choices necessary to accomplish that result.

Gramm-Rudman was designed as a politically palatable means of balancing the budget. Some Congressmen who supported its passage felt that the spectre of automatic cuts under the Act would compel Congress and the President to make the hard choices they had theretofore shunned.[4] But none would quarrel with the notion that Congress enacted Gramm-Rudman in order to assure that the budget deficit would be reduced, whether or not its Members continued to decline openly to choose between competing interests. Generally, Gramm-Rudman achieves this result by establishing a maximum allowable deficit amount for each fiscal year between 1986 and 1991, and by creating an administrative mechanism to implement those targets automatically, regardless of what spending levels are set by enacted legislation, unless the legislation meets the target. We turn now to a more detailed consideration of the role of this new administrative mechanism in the overall budgetary process.

b. Gramm-Rudman directs the President to submit in January of each year a budget that does not exceed the target deficit for the upcoming fiscal year, which begins the following October. Congressional Budget and Impoundment Act of 1974, 31 U.S.C. 1105(f), as amended by Section 241(b). In order to measure anticipated revenues against anticipated expenditures, and predict the deficit so as to meet the target, the President must, in January, predict the conditions of the economy for the next 21 months through the end of the coming fiscal year. Unpredicted changes in domestic and international

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[3] *See, e.g.*, 131 Cong. Rec. H11887 (Dec. 11, 1985) (remarks of Rep. Jones).

[4] *See, e.g.*, 131 Cong. Rec. S17389 (Dec. 11, 1985) (remarks of Sen. Gramm).

economic conditions during that period will affect, sometimes dramatically, revenues collected, expenditures made, and hence the size of the deficit. The Act contemplates that Congressional action on all appropriations be completed in June.[5]

Although political pressure to fund all programs continues under Gramm-Rudman, the difference is that the individual appropriations measures passed by Congress and signed by the President may be drastically altered to meet the target deficit by administrative action automatically implemented without further congressional or Presidential consideration. Thus, on August 20 each year, the CBO and OMB must issue a report in which they predict what the deficit will be in the next fiscal year, considering all legislation enacted by August 15, the condition of the economy, and their forecast of economic conditions in the upcoming fiscal year. Sections 251(a)(1) and (a)(2); J.A. 109-110. If they predict that the target deficit will be exceeded by 10 billion dollars or more, they must specify in accordance with the Act's requirements which programs must be cut, and to what degree. Sections 251(a)(2) and (a)(3); J.A. 110-114. Because they must issue a single report, the Directors are instructed to "average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction." Section 251(a)(5); J.A. 115.

Within five days after the OMB/CBO report is issued, on August 25, the Comptroller General must review it and issue his own report. Section 251(b); J.A. 116-118. The Comptroller General's deficit prediction, based on his economic forecast, determines whether and to what extent

[5] The Act's timetable contemplates completion of the non-binding concurrent resolution, meeting target deficits by April 15, reconciliation legislation by June 15, and House action on all annual appropriations by June 30. Section 201(b), amending Sections 300 and 301(a) and (i) of the Budget Act. Joint Appendix ("J.A.") at 106-108.

cuts must be made in existing spending levels.[6] Significantly, the economic data, assumptions, and methodology used by the Comptroller General to determine the projected deficit are not subject to judicial review. Section 274(h); J.A. 166.

By September 1, the President must issue a "sequestration" order, carrying out, without change, the cuts specified by the Comptroller General. Section 252(a)(1),(a)(3); J.A. 124-125, 128. This order takes effect unless within one month, by October 1, Congress and the President enact alternative reductions that would result in meeting the target deficit. The Act provides for a second round of reporting by OMB and CBO on October 5, and by the Comptroller General on October 10, to account for changes since August 25. Section 251(c); J.A. 118-119. In accordance with those reports, on October 15, the President issues a final sequestration order, effective immediately. Section 252(b); J.A. 132-134.[7]

c. Congress recognized that the automatic reduction mechanism raised serious constitutional questions concerning the separation of powers. Therefore, it provided for expedited judicial review of the Act's constitutionality as well as a failback provision, should the automatic mechanism be declared invalid for any reason. Sections 274

[6] The Act requires equal reductions between defense and nondefense programs. Section 251(a)(3)(B); J.A. 110-111. To do this, it first eliminates all automatic cost of living adjustments mandated by Statute, or reduces them to the point where one half the excess deficit, as forecast by the Comptroller General, is eliminated. Section 251(a)(3)(C); J.A. 111. Then the remaining parts of the budget (except for those parts exempted), are to be reduced by a uniform percentage until the target is met. Section 251(a)(3)(F); J.A. 112-114.

[7] The foregoing discussion was based on the deadlines and process the Act imposes for fiscal years 1987 to 1991. The process used for 1986 was the same in principle, with some adjustments to account for the fact that the Act was not signed into law until two months into the fiscal year. The 1986 provision of primary relevance to this case froze cost-of-living adjustments due federal retirees on January 1, 1986. Section 252(a)(6)(C); J.A. 129-130.

(a)-(c), (f); J.A. 162-166. Under the fallback provision, the Comptroller General is eliminated from the deficit reduction process, and the report of OMB and CBO goes instead to a joint budget committee of Congress. The budget committee reports its contents to both Houses which then consider the matter on an expedited basis. The cuts specified in the report will go into effect, like any other legislation, only if both Houses and the President concur (or if the President's veto is overridden). Section 274(f); J.A. 165-166.

2. Proceedings Below

a. The 9,000 retiree/members of the National Treasury Employees Union ("NTEU" or "the Union") were among the first persons injured by the Act, alleging that the automatic trigger is unconstitutional, and that the cost-of-living adjustment frozen on Jan. 1, 1986, should be fully restored. NTEU filed suit on December 31, 1985, to challenge the constitutionality of the automatic reduction mechanism. J.A. 13-15. Its suit was consolidated with an action filed by Representative Mike Synar and eleven other Congressmen. The Senate, the House Bipartisan Leadership Group, and the Comptroller General intervened in defense of the statute.

In the court below, the United States (the nominal defendant) unsuccessfully challenged the Congressmen's standing to maintain the suit. J.A. 30-31, 36-38. All parties agreed, however, and the Court ruled, that NTEU had standing to assert the rights of its retiree/members, whose cost of living adjustments for 1986 were eliminated. *Id.* at 31, 34-36.

b. In the court below, plaintiffs argued that the Act's automatic spending reduction mechanism violates the Constitutional provision vesting all legislative power in Congress. NTEU explained that in this Act, Congress and the President have abdicated their constitutional duty to legislate the nation's spending priorities, and that the Act impermissibly and in unprecedented fashion delegates legislative authority to various unelected administrative officials, whose decisions and methods are ex-

plicitly insulated from judicial review. Further, plaintiffs contended that, to the extent Congress could delegate any authority here, it may not delegate it to the CBO, a congressional agency, or the Comptroller General, an official who is removable by Congress.

c. The district court ruled that the automatic spending reduction mechanism violates the separation of powers doctrine on the second ground plaintiffs advanced. J.A. 55-80. The court rejected plaintiffs' arguments that the enormous and unguided authority the Act gives to OMB, CBO, and the Comptroller General to alter existing legislation, on the basis of unguided and unreviewable determinations and methodologies, violates the constitutional provision that vests all legislative power in Congress. *Id.* at 38-55.

However, the court ruled that the role of the Comptroller General in the spending reduction mechanism violated separation of powers principles. The court concluded that the powers the Act confers upon the Comptroller General are executive in nature and that the Comptroller General cannot, consistent with the separation of powers doctrine, exercise such executive powers because he is removable by and thus beholden to Congress. *Id.* at 71-78.

Relying on precedents of this Court, the district court rejected the intervenors' contentions that the constitutionality of the Comptroller General's role in the automatic reduction process was not ripe for review, holding that Congress' removal power creates a "here-and-now subservience" of the Comptroller General to Congress. J.A. 57. The court also rejected intervenors' suggestion that if the powers granted to the Comptroller General under the Act cannot be assigned to an officer removable by Congress, then the 1921 statute that makes him so removable, not the 1985 grant of powers, should be stricken. J.A. 59-61.

Thus, the district court declared the automatic deficit reduction mechanism unconstitutional, and the Presiden-

tial sequestration order issued February 1, 1986, without legal force and effect.

SUMMARY OF ARGUMENT

1. The automatic deficit reduction mechanism is an overbroad delegation of legislative power to the Act's administrators. The automatic mechanism cannot be constitutionally sanctioned for several reasons. First, that mechanism would directly undermine a central principle of the delegation doctrine: that fundamental policy decisions, such as those required to establish a balanced federal budget, are to be made by accountable elected officials. In violation of this principle, the Act transfers to its unelected administrators the responsibility for determining whether spending levels in duly considered appropriations laws will be reduced, and to what extent, and it allows these administrative determinations to take effect automatically. As the legislative debates reveal, Congress devised the automatic reduction scheme not for reasons of governmental necessity but for reasons of political expediency. The automatic mechanism permits attainment of a balanced budget but in a way that insulates members of Congress from making the hard—and unpopular—choices which are needed to reach that goal.

Second, the key principle of accountability is further undercut because, in making its unprecedented, wide-ranging delegation of power to the Act's administrators, Congress provided no meaningful standards to guide them in the making of pivotal budget deficit estimates. Such deficit estimates are highly speculative and yet they ultimately decide whether, and in what amounts, spending must be cut to meet the Act's deficit targets. Finally, the uncontained nature of the delegation made by the Act is further underscored by its total preclusion of judicial review of the crucial deficit projections that trigger the automatic reduction mechanism.

2. The Act is administered by the Comptroller General, in coordination with the Congressional Budget Office and the Office of Management and Budget. Because

the Comptroller General may be removed by and is beholden to Congress, he may not constitutionally exercise the executive power assigned to him by the Act. The congressional power to remove the Comptroller General, coupled with the lack of any counterbalancing power on the part of the President, ensures the Comptroller General's fealty to Congress. The legislature thus retains an influence over administration of the Act that violates separation of powers principles. The court below correctly discerned that "here and now subservience" to Congress is guaranteed by the potent power of removal.

Finally, this Court should decline appellants' invitation to strike this removal provision if it concludes that the powers assigned by the Act to the Comptroller General cannot be conferred upon an officer removable by Congress. On the basis of this Court's precedents, the district court correctly determined that the path of eliminating the removal provision was not open to it. The court also rightly concluded that, even if it had such an option, it should be rejected given the Act's legislative history, its inclusion of a specific fallback deficit reduction provision, and the uncertain consequences of striking the removal provision upon the Comptroller General's duties under other statutes.

ARGUMENT

THE ACT'S AUTOMATIC DEFICIT REDUCTION PROCESS IS UNCONSTITUTIONAL.

INTRODUCTION

The Union contends that the Act's automatic spending reduction provisions are constitutionally defective because they mark an overbroad delegation of legislative power. This case presents the fundamental question of whether Congress can constitutionally create a statutory mechanism that transfers to unelected administrators the power to determine federal budget reductions where: (1) the magnitude of those reductions is based on the administrators' economic forecasts, the making of which is unguided by any meaningful standards; and (2) the reductions override duly enacted appropriations and occur automatically without approval by any elected officials.

We urge that such a mechanism is constitutionally impermissible because the Act, at bottom, represents a congressional effort to avoid making the hard choices that all acknowledge must be made in order to meet the declared objective of balancing the federal budget. Congress, in this Act, sought to insulate itself from having to specify the requisite, but politically unpopular, spending determinations, and instead assigned the task of deciding whether spending reductions would take place, and in what amounts, to the Act's administrators. Under the Act's scheme, the administrators' determinations can take effect automatically without any Presidential review or affirming congressional action. We believe that this scheme cannot stand because it frustrates—by design—the primary purpose of the delegation doctrine: to assure that fundamental policy decisions, such as the setting of spending levels for the federal government, will be made by accountable, elected representatives.

We alternatively maintain that, assuming Congress may delegate budget-cutting responsibilities, the way it has chosen to do so is constitutionally defective. The district court correctly concluded that the Act's assignment of administrative responsibilities to the Comptroller General, an official removable by and thus beholden to Congress, violates well established principles of separation of powers.

I. THE AUTOMATIC DEFICIT REDUCTION PROCESS CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF CONGRESS' RESPONSIBILITY TO SET SPENDING LEVELS.

A. The Governing Principles of the Delegation Doctrine Underscore that Fundamental Policy Choices, Such as Those Required to Establish the Contours of Federal Spending, Must Be Made by Congress and Not by Unelected Officials.

As the district court observed, the delegation doctrine derives from the principle of separation of powers that

underlies our three-branch system of government. J.A. 39. This Court has instructed that this principle is breached where "Congress gives up its legislative power and transfers it . . ." to the executive branch. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). More recently, the Court has reaffirmed that separation of powers "was not simply an abstract generalization in the minds of the Framers" (*INS* v. *Chadha*, 462 U.S. 919, 946 (1983), *quoting Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976)), but a vital restraint designed to ensure that "the carefully defined limits on the power of each Branch must not be eroded." *INS* v. *Chadha*, 462 U.S. at 958.

We believe that, in this Act, Congress unquestionably overstepped its authority and breached the separation of powers principle. As we show, the Act confers on its administrators "such a breadth of authorized action" that it ultimately surrenders to them "the functions of a Legislature . . ." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 418 (1935). The abdication of legislative power found in the Act cannot be squared with "the profound conviction of the framers that the powers conferred on Congress were the powers to be most carefully circumscribed." *INS* v. *Chadha*, 462 U.S. at 947.

Article I of the Constitution vests "[a]ll legislative powers . . . in a Congress . . . which shall consist of a Senate and House of Representatives" and declares that Congress is "[t]o *make all laws* which shall be necessary and proper." U.S. Constitution art. I, sections 1, 8 (emphasis added). In addition, and of particular relevance for this case, Article I stipulates that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." *Id.*, sec. 9, cl. 7. This Court long ago recognized that Article I imposes a limit on Congress' ability to delegate its law-making power to the other branches of government: "That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by

the constitution." *Field* v. *Clark*, 143 U.S. 649, 692 (1892). Implicit in this limiting principle was a recognition that unchecked transfers of legislative power would insulate the legislature from accountability to the electorate and thus thwart the Constitution's design that laws are to be democratically considered in accord with a "finely wrought and exhaustively considered, procedure." *INS* v. *Chadha*, 462 U.S. at 951.

While the admonition against undue delegation has been frequently iterated, the principle has seldom been held to be breached. As the district court observed, there are only two cases, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan, supra*, in which the Court declared statutes unconstitutional because of overbroad delegations.

It is clear, however. that while no statute has lately been voided because of delegation defects, the principles of the doctrine continue to be instrumental. *See, e.g., National Cable Television Association* v. *United States*, 415 U.S. 336 (1974), and *Kent* v. *Dulles*, 357 U.S. 116 (1958) (where the Court invoked the delegation doctrine to read a statute narrowly and thus avoid the constitutional question).

Although the Court has taken various approaches in saving numerous statutes from challenges of excessive delegation, no simple test for overbroad delegation has emerged.

The salient considerations underlying the delegation doctrine were perhaps most aptly stated by Justice Harlan in an often-cited dissenting opinion in *Arizona* v. *California*, 373 U.S. 546 (1963). Justice Harlan explained that the doctrine serves two primary functions, of especial relevance here, which are essential to the Constitution's separation of powers scheme:

> *First*, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to

> the people. *Second,* it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Id. at 626. When viewed against the backdrop of the doctrine's animating principle of accountability, this Court's decisions provide a useful focus, and reveal why this Act exceeds the limit of lawful delegation.

First, and most fundamental, is the requirement that Congress genuinely exercise the "essentials of the legislative function" by making the basic policy decisions and formulating a rule of conduct to effectuate its policy devices. *Yakus* v. *United States,* 321 U.S. 414, 424 (1944). Embodied in this factor is the overarching principle that the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate . . ." *United States* v. *Robel,* 389 U.S. 258, 276 (1967) (Brennan, J., concurring). The inquiry mandated is aimed at ensuring that Congress make the so-called hard choices; it instructs that Congress' "policy-making function" is not to be passed on to those not "answerable or responsive in the same degree to the people." *Ibid.*

Second, and consonant with the doctrine's objective of ensuring accountability, is the requirement that the statute provide sufficient standards to guide the exercise of delegated power. The statute must provide an "intelligible principle" which can be discerned and followed by the delegate. *J.W. Hampton, Jr. & Co.* v. *United States,* 276 U.S. at 409. While obviously connected to the ultimate question of whether Congress has sufficiently exercised its legislative power, the "sufficient standards" requirement shifts the focus to whether Congress has provided enough policy guidance to administrators that its will can be followed. *Yakus,* 321 U.S. at 424-425.

Third, the Court must assess the role of so-called governmental necessity. The Court has recognized the "necessity" for increasingly broad congressional delegation, under the rationale that certain decisions may be delegated to administrators because they are just too tech-

nical, complicated, or detailed, or they require expertise not possessed by Members of Congress. *See Buttfield* v. *Stranahan*, 192 U.S. 470, 496 (1904).

Lastly, and particularly in cases involving broad delegations, the courts have been sensitive to the availability of judicial review as a check on the granting of uncontrolled discretion to delegates. *See e.g., Yakus*, 321 U.S. at 425, *Amalgamated Meat Cutters* v. *Connally*, 337 F.Supp. 737, 755, 757, 759 (D.D.C. 1971) (three-judge court).

Obviously, the factors described do not themselves provide one coherent theory for analyzing delegation problems. To be useful as yardsticks, they must not be viewed in isolation, as we believe the district court did, nor do they necessarily deserve equal weight. They must be examined as a whole and always in connection with the fundamental purpose of the delegation doctrine: the preservation of political accountability in our representative form of government.[8]

In the Act, Congress and the President, motivated by the wish both to balance the budget and to avoid being identified as the cause of the resulting pain, created a device that does both, the "automatic" trigger. The infirmity of the law is that it places in the hands of unelected officials the power to decide whether reductions in duly enacted appropriations laws will be made at all and how deep those reductions must be, and it makes the de-

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[8] Regarding the delegation doctrine's objective of ensuring accountability in governmental decisionmaking, see *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *McGautha* v. *California*, 402 U.S. 183, 272 (1971) (Brennan, J., dissenting); *United States* v. *Robel*, 389 U.S. 258, 276 (1976) (Brennan, J., concurring); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 735, 746 (D.D.C. 1971) (three-judge court).

The commentators, too, have stressed accountability concerns in examining the delegation doctrine's rationale. *See, e.g.*, Wright, *Book Review*, 81 Yale L.J. 575, 582-587 (1972) (reviewing K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969)); J. Ely, *Democracy and Distrust* (1980) at 131-134.

cisions of those officials effective automatically. This enormous power is, in vital respects, unguided by the legislature and unchecked by anyone, including the judiciary. The result is that new, substitute laws are being made and effected outside the lawmaking framework established by the Constitution. As we shall show, while other statutes similar in some respects to the Act have survived delegation challenges, none had the cumulative infirmities found in the Act, which lead—indeed by design—to the utter frustration of the accountability objective that lies at the heart of the delegation doctrine.[9]

B. The Statute's Automatic Deficit Reduction Mechanism Frustrates the Delegation Doctrine's Central Purpose of Ensuring that Elected Legislators Be Accountable for the Fundamental Policy Determinations Concerning the Setting of Federal Spending Levels.

1. *The Automatic Mechanism Represents an Incomplete Exercise of the "Essentials of the Legislative Function."*

In the Gramm-Rudman Act, Congress failed to perform the "essentials of the legislative function." *Yakus*, 321 U.S. at 424. The Constitution demands that Congress itself make the "hard choices" that lie at the core of policy embodied in law. Examination of the circumstances surrounding the passage of the Act reveals a clear congressional purpose to avoid those hard choices and instead to transfer essential lawmaking responsibilities to the Act's administrators.

It has been widely accepted that the deficit is dangerously high and must be reduced. Virtually all who spoke in the Gramm-Rudman debate prefaced their remarks with protestations of absolute commitment to reducing

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[9] With the device of the legislative veto no longer available, Justice White predicted in dissent in *INS* v. *Chadha*, 492 U.S. at 968, Congress will be tempted "to abdicate its law-making function . . . ," resulting in "unaccountable policymaking by those not elected to fill that role." In our view, in passing the Gramm-Rudman Act, Congress has succumbed to the temptation to abdicate.

the deficit. It was also clearly understood what the limited options are for reaching that goal: significant defense reductions, significant reductions in non-defense programs, cuts in "entitlement" programs, tax increases, or some combination of these. *See, e.g.*, remarks of Sen. Nunn, 131 Cong. Rec. S17425-26 (Dec. 11, 1985). Everyone also understood that these truly difficult choices have not been made in the Act itself.

In fact, the congressional debates make quite clear that Congress intended to avoid those basic choices that are the essence of policymaking, because it wished to avoid accountability for such unpopular choices. It intended that the budget be balanced through the automatic mechanism without ever requiring Congress to vote on specific spending reductions or tax increases.[10]

We discuss *infra* at 21-24 the ways unelected officials exercise unfettered discretion under the Act. We show first, that Congress wished to and did avoid making essential policy choices; second, that the power ceded was a legislative power; and, finally, that the Act assures that Congress can continue to avoid being held politically accountable and that the result is abject failure to perform the essentials of the legislative function.

a. That Gramm-Rudman itself does not confront the hard decisions required to control the budget deficit was recognized by key supporters of the Act during the legislative debates. As Senator Dodd observed, "[t]he easiest

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[10] We recognize, of course, that in passing a statute as complex as Gramm-Rudman, it cannot fairly be said that Congress made no policy choices. For example, it decided that certain federal programs were to be exempt from budget reductions and it determined that the automatic cuts were to be divided evenly between defense and non-defense programs. But clearly it does not follow that because Congress made *some* policy decisions, it therefore fulfilled its legislative responsibilities. One cannot ignore what Congress chose *not* to do: namely, to choose among the known alternatives for reducing the budget, and to decide whether cuts would be made at all in a given year, and what the depth of those cuts would be.